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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-939
FEDERAL ELECTION COMMISSION,
Petitioner,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Respondent.

and

No. 80-1129
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Petitioner,

v.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF PETITIONER NATIONAL REPUBLICAN SENATORIAL COMMITTEE

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QUESTIONS PRESENTED FOR REVIEW

1. Does 2 U.S.C. § 441a(d)(3) prohibit agreements through which state committees of a political party designate the senatorial campaign committee of the same party as the agent of the state committees to make limited expenditures in support of the party's candidates for election to the United States Senate?

2. Does 2 U.S.C. § 441a(d)(3), if construed to prohibit these agency agreements, violate the First Amendment by infringing upon rights of political expression and association?

3. Did the court of appeals err in conducting a *de novo* review of the Federal Election Commission's decision to dismiss an administrative complaint and in failing to defer to the longstanding practice of the agency?

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BRIEF OF PETITIONER NATIONAL REPUBLICAN SENATORIAL COMMITTEE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit and the opinion of the United States District Court for the District of Columbia appear in the Appendix to Petitioner National Republican Senatorial Committee's Petition for Certiorari. That Appendix also contains the certification of the vote of the Federal Election Commission and its First General Counsel's Report in this proceeding.

JURISDICTION

The judment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 9, 1980. A timely petition for rehearing *en banc* was denied on October 11, 1980, and the petitions for certiorari were filed within 90 days of that date. The jurisdiction of this Court is invoked under 2 U.S.C. § 437g(a)(9) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Code, Title 2:

§ *441a*

Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.

(d) (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

STATEMENT OF THE CASE

The National Republican Senatorial Committee ("NRSC") is a unit of the Republican Party organized in 1948 by Republican members of the United States

Senate specifically to support Republican senatorial candidates. Its counterpart, the Democratic Senatorial Campaign Committee ("DSCC"), is a political committee composed of Senators of the Democratic Party which regularly supports senatorial candidates of that party. DSCC and NRSC are supported by voluntary limited contributions from individuals and committees.

In 1980 the Republican National Committee ("RNC") and the Democratic National Committee ("DNC") each executed written agreements designating NRSC and DSCC respectively as their agents for the purpose of making expenditures up to the limits contained in 2 U.S.C. § 441a(d)(3), a provision of the Federal Election Campaign Act of 1971, as amended ("FECA").[1] RNC had entered into a similar agreement with NRSC in 1978.[2]

Section 441a(d)(3) limits expenditures that may be made by the national or a state committee of a political party "in connection with the general election campaign of" a candidate for Congress.[3] Under § 441a(d)(3), these committees "may not make any expenditure" in connection with the campaign of a candidate for United States

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[1] 2 U.S.C. §§ 431-55 (1976 & Supp. III 1979) (originally enacted as Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §301, 86 Stat. 11, as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §201, 88 Stat. 1272; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, §101, 90 Stat. 475; and Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, §101, 93 Stat. 1339) [hereinafter cited to 2 U.S.C. unless otherwise indicated].

[2] These agreements are not challenged by DSCC in this case. *See* Democratic Senatorial Campaign Comm. v. FEC, No. 80-2074, at A5 (D.C. Cir. Oct. 9, 1980) (*per curiam*) [hereinafter cited as *DSCC v. FEC* with page citations to Appendix to NRSC's Petition for Certiorari].

[3] 2 U.S.C. § 441a(d)(3).

Senator which exceeds the greater of $20,000 or "2 cents multiplied by the voting age population of the State."[4]

In 1980, pursuant to agency agreements, NRSC and DSCC made expenditures on behalf of RNC and DNC respectively in senatorial campaigns. As a result of and in accordance with the agency agreements, DNC and RNC, through their respective senatorial committees, have financed communications and general campaign activities in support of the election of Republican and Democratic senatorial candidates.

In 1978 a number of state committees entered into similar written agency agreements with NRSC. Accordingly, in the course of the 1978 senatorial campaigns, NRSC spent $2,770,995 as agent for RNC and several Republican state committees, a figure well within the overall limitations contained in § 441a(d)(3) for expenditures by these committees. *DSCC* v. *FEC,* at A4. After the 1978 campaign, the Federal Election Commission ("FEC") decided, on two separate occasions, that NRSC's agreements with these state committees were consistent with § 441a(d)(3). *In re National Republican Senatorial Committee,* Federal Election Commission Matter Under Review 820; *In re National Republican Senatorial Committee,* Federal Election Commission Matter Under Review 780. In 1980 a number of state committees again entered into agency agreements with NRSC.

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[4] *Id.* With respect to campaigns for election to the House of Representatives in multi-district states, the expenditure limitation is $10,000 per electoral contest. *Id.* Section 441a(d)(3) does not apply to party expenditures on behalf of presidential candidates which are governed by § 441a(d)(2). This latter provision is not at issue in this case.

On May 9, 1980 DSCC filed an administrative complaint with the FEC alleging that NRSC's agreements with state committees in 1978 and 1980 violate § 441a(d)(3). The complaint did not challenge the identical agreement between NRSC and RNC.[5] After reviewing a report prepared by its General Counsel,[6] the FEC dismissed the complaint on July 11, 1980 by a vote of 6-0. The FEC concluded that there was "no reason to believe" that the agreements violate § 441a(d)(3).[7]

On July 30, 1980 DSCC filed a petition for review in the United States District Court for the District of Columbia pursuant to 2 U.S.C. § 437g(a)(8) requesting a declaratory judgment that the FEC's decision was contrary to law. On August 28, 1980 the district court, which denied NRSC's motion to intervene, granted the FEC's motion for summary judgment and concluded that the FEC's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Democratic Senatorial Campaign Committee* v. *Federal Election Commission,* No. 80-1903, at B4 (D.D.C. Aug. 28, 1980) [page citation to Appendix to NRSC's Petition for Certiorari].

On September 4, 1980 DSCC docketed an appeal of the district court decision in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals granted NRSC leave to intervene on September 22. Following oral argument before Chief Judge Wright and Judges Wilkey and Ginsburg, the court of appeals reversed the decision of the district court on October 9, 1980 in a *per curiam* opinion. Judge Wilkey dissented.[8]

[5] *See* DSCC v. FEC, at A5.

[6] *See* Appendix to NRSC's Petition for Certiorari, at D1 (In re National Republican Senatorial Committee, FEC Matter Under Review 1234).

[7] *Id.* at C1.

[8] *See id.* at A1.

The court of appeals concluded that in the absence of explicit statutory authorization the agreements between NRSC and the state committees violate § 441a(d)(3). As a result, NRSC's expenditures in support of senatorial candidates exceeded the limitations contained in § 441a(d)(3). Accordingly, the court declared the FEC's failure to act on DSCC's complaint "contrary to law," and ordered the FEC to "conform" to its decision "forthwith."[9] The court, *sua sponte*, ordered the mandate to issue "forthwith."[10] On October 10, 1980 NRSC filed a petition for rehearing with a suggestion for rehearing *en banc* and an application to recall the mandate. Both motions were denied by the court of appeals on October 11.[11]

Having exhausted all available avenues of relief in the court of appeals, NRSC applied on October 16, 1980 to the Chief Justice of the United States for an order to stay enforcement of the judgment below. *See* 28 U.S.C. § 2101(f) (1976). On October 17 the Chief Justice entered an order temporarily granting the application.[12] The Court denied a motion by DSCC to vacate the stay on October 21.[13] DSCC filed a motion for "expedited consideration" on October 27 which the Chief Justice denied as "moot" on October 28.[14] The stay entered by

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[9] *Id.* at A19. The judgment directs the FEC to remedy the claimed violation of § 441a(d)(3). *See* 2 U.S.C. § 437g. In the event the FEC fails to "conform" with the judgment, DSCC may itself seek judicial enforcement against NRSC. *Id.* § 437g(a)(8)(C).

[10] *See* Appendix to NRSC's Petition for Certiorari, at E2.

[11] *See id.* at F1.

[12] *See* Joint Appendix ("J.A."), at 7.

[13] *Id.* at 8.

[14] *Id.* at 9.

the Chief Justice on October 17, 1980 and reviewed by the Court on October 21, 1980 remains in effect.

The FEC filed a petition for a writ of certiorari on December 10, 1980 (No. 80-939) and NRSC filed a petition for a writ of certiorari on January 6, 1981 (No. 80-1129). On March 2, 1981 this Court granted both writs and consolidated the cases for briefing and argument.

SUMMARY OF ARGUMENT

A.1. The language of 2 U.S.C. § 441a(d) gives national and state committees of political parties broad authority to make expenditures in support of candidates for federal office. 2 U.S.C. § 441a(d)(1). The only restriction placed on this expenditure authority is the dollar limitations of § 441a(d)(3). Section 441a(d)(3) does not restrict the method, including agency agreements, by which party committees may make these expenditures. No prohibition of agency agreements is evident from the plain language of § 441a(d).

2. Section 441a furthers the purpose of FECA by preventing undue influence on candidates caused by large campaign contributions. The effect of §§ 441a(a)(1), (2) and (3) is to limit contributions to party committees. The candidate does not know who contributed the funds that a party committee spends on his behalf. *See* 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 110.6 (1981). Once the limited contributions are received by party committees the purpose of § 441a is not advanced by prohibiting transfer of funds between such committees. Accordingly, Congress ensured that party committees, including senatorial and congressional campaign committees, remain free to transfer unlimited funds under § 441a(a)(4). The agency agreements between NRSC and state committees are con-

sistent with the transfer authority of § 441a(a)(4). The agreements comport with the purpose of § 441a because contributions received by party committees are limited by § 441a(a) and amounts expended by party committees on behalf of senatorial candidates are limited by § 441a(d)(3). To construe § 441a(d)(3) to prohibit agency agreements conflicts with the transfer authority of § 441a(a)(4), destroys the harmony of the statutory scheme and undermines its purpose.

3. The legislative history of § 441a(d) confirms that agency agreements are consistent with congressional intent. Section 441a(d) was originally proposed in S.3044, §304, which contemplated total public financing of general election campaigns for federal office. *See* S.3044, §101, 93d Cong., 2d Sess. 71-78, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 73-80 (1977). Even under this proposed system of public financing, Congress intended to preserve "the role of political parties in private financing for federal candidates." S. Rep. No. 93-689, 93d Cong., 2d Sess. 7, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977). Congress further intended that party committees retain flexibility with regard to structuring the use of funds in political campaigns. NRSC and state committees are free to enter agency agreements which enhance the role of political parties in the electoral process by facilitating the pooling of resources to amplify the message of the party and its adherents.

B.1. Section 441a(d)(3) operates in an area at the core of First Amendment guarantees of free expression and association. *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976), leaves

no doubt that "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." State committees enter into agency agreements with NRSC in order to enhance their advocacy of party candidates by utilizing the resources and political expertise of NRSC. The court of appeals construction of § 441a(d)(3) restricts the ability of party committees to engage in effective advocacy of the election of senatorial candidates.

2. In light of the First Amendment interest implicated by the court of appeals decision, its construction of § 441a(d)(3) can be supported only if it serves a substantial governmental interest. *Id.* at 47. In *Buckley,* this Court held that the only sufficiently compelling governmental interest in this area is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions." *Id.* at 25. The court of appeals did not and cannot claim that its reading of § 441a(d)(3) is necessary to stem incipient political corruption since "there is no visible evil in any 'undue influence' by a political party on its own nominated candidate." *DSCC* v. *FEC,* at A38 (Wilkey, J., dissenting).

3. The court of appeals construction of § 441a(d)(3), which is inconsistent with the interpretation of both the district court and the unanimous FEC, is at odds with the plain meaning of the statute and the First Amendment requirements articulated in *Buckley.* When First Amendment rights are at stake, a reviewing court must read the statute at issue narrowly in order not to limit the quantity of political expression. *Id.* at A39. The court of appeals disregarded this maxim of statutory construction.

C. The express grant of exclusive jurisdiction to the FEC over enforcement of FECA limits judicial review of the FEC's dismissal of an administrative complaint. *In re Carter-Mondale Reelection Committee, Inc.*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132, at 51,038 (D.C. Cir. Sept. 12, 1980). If the FEC has not acted in a manner which is arbitrary or capricious, an abuse of discretion or otherwise contrary to law, its decision should not be overturned. *Hampton* v. *Federal Election Commission,* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036, at 50,444 (D.D.C. Apr. 15, 1977), *aff'd mem.*, No. 77-1546 (D.C. Cir. July 21, 1978). In the instant case, the FEC's decision has a reasonable basis in law. It is consistent with past practices of the agency and supported by the language and purpose of the statute. The FEC's finding of "no reason to believe" that NRSC violated FECA in making expenditures under § 441a(d)(3) as agent of Republican state committees is entitled to deference by reviewing courts and should be upheld. *DSCC* v. *FEC,* at A29 (Wilkey, J., dissenting).

ARGUMENT

A. Section 441a(d)(3) Does Not Prohibit State Committees Of A Political Party From Designating The Senatorial Campaign Committee Of The Same Party As The Agent Of The State Committees To Make Limited Expenditures In Support Of The Party's Senatorial Candidates.

1. The plain language of 2 U.S.C. § 441a(d) does not prohibit agency agreements.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 100 S. Ct. 2051, 2056 (1980); *accord, Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979). "Absent a

clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *GTE Sylvania, Inc., supra,* 100 S. Ct. at 2056. Application of this fundamental rule establishes that § 441a(d) does not prohibit the agency agreements at issue.

Section 441a(d)(1) provides that "*[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions,*" the national and state committees of a political party "may make expenditures in connection with the general election campaign of candidates for Federal office" subject to the dollar limitations of subsections (2) and (3). 2 U.S.C. § 441a(d)(1) (emphasis added). Section 441a(d)(3) permits the "national committee of a political party, or a state committee of a political party" to make expenditures "in connection with the general election campaign of a [senatorial] candidate . . . who is affiliated with such party" of up to 2 cents per voting age resident. *Id.* § 441a(d)(3).

The court of appeals found that § 441a(d)(3) authorizes only two named committees, the national and state committees of a political party, to make expenditures in support of party candidates. *DSCC* v. *FEC*, at A13. The court concluded that NRSC was neither the national committee nor a state committee of the Republican Party.[13] In addition, the court found that the statute made no reference to "any other kind of permissible arrangement by which the state committees can delegate their spending authority to any other organization." *Id.* The court held, therefore, that § 441a(d)(3) "preclude[s] any arrangement by which the special [spending] authority" of the national

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[13] DSCC v. FEC, at A13; *see* 2 U.S.C. §§ 431(14) & (15).

or state committees is transferred to another party committee. *Id.*[16]

The court of appeals construction is erroneous. The prefatory language of § 441a(d) provides that "[n]otwithstanding any other provision of law" with respect to expenditure and contribution limitations, national and state committees may make expenditures in support of party senatorial candidates up to the limits of § 441a(d)(3). This language confers broad expenditure authority upon national and state party committees. The limitations of § 441a(d)(3) restrict *only* the overall dollar amounts which the national or state committees may spend in campaigns for federal office. *Id.* at A22 (Wilkey, J., dissenting).

Section 441a(d)(3) does not restrict the methods which may be used by the national and state committees to expend monies within the overall dollar limits. It contains *no* reference to agreements whereby state committees or the national committee of a political party designate other party committees to make expenditures in support of the party's candidate. As the court of appeals acknowledged, the "language of Section 441a(d)(3) presumably does not prohibit a State political committee's employment of an agent in the standard legal sense."[17] Since the statute permits use of agents by na-

[16] Since DSCC's agency agreement with DNC and NRSC's agency agreement with RNC are the "exact parallel" to NRSC's agreements with state committees, the court of appeals reasoning would bar these agency agreements. DSCC v. FEC, at A25 (Wilkey, J., dissenting).

[17] DSCC v. FEC, at A14. Notwithstanding this acknowledgement, the court characterized the agreements between NRSC and the state committees as "artificial relationships" not authorized by § 441a(d)(3). *Id.* The court cited no factual support for its conclusion that the agreements are artificial or otherwise inconsistent with the statute.

tional or state committees, it cannot be read to prohibit agency agreements between NRSC and Republican state committees.

In sum, the plain language of § 441a(d) confers broad authority upon the national and state committees to make expenditures within the designated overall dollar limitations. Nowhere does it restrict the permissible means, including the use of agency agreements, of making these expenditures. The agency agreements between NRSC and Republican state committees are not prohibited by § 441(a)(d)(3).

2. Agency agreements comport with the meaning and purpose of FECA.

The court of appeals failed to construe FECA as a whole in order to effectuate its purpose and give meaning to each provision of § 441a. *See Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). The purpose of federal election reform as embodied in FECA is the elimination of undue and corrupting influences of large campaign contributors on successful political candidates. *Buckley* v. *Valeo*, 424 U.S. 1, 25-26 (1976); *DSCC* v. *FEC*, at A32-A33 (Wilkey, J., dissenting). This purpose is served by § 441a.

Section 441a(a)[18] prevents undue influence on candidates by delineating permissible contributors and

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[18] Section 441a(a) provides in pertinent part:

§ 441a. Limitations on contributions and expenditures.

(a) *Dollar limits on contributions.*

(1) No person shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office, which in the aggregate, exceed $1,000;

amounts of contributions to political committees and candidates for federal office. The effect of subsections (a)(1), (2) and (3) is to limit the dollar amount of contributions from all sources to party committees. Once party committees receive these limited contributions, a successful candidate cannot be unduly influenced by any contributor to a party committee that supports the candidate. *Id.* at A35. The amount of the individual contribution is limited and the candidate does not know

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(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

who contributed the particular funds he receives from any party committee. *Id.*[19] Furthermore, party committee expenditures are subject to the overall spending limitations under § 441a(d)(3). *Id.*[20]

Congress recognized that the purpose of § 441a is not advanced by prohibiting transfer of funds between political committees of the same party. As a result, Congress provided in § 441a(a)(4) that the contribution limitations contained in §§ 441a(a)(1)-(3) "do not apply to transfers" between political committees which are "national, State, district or local committees" of the "same political party." 2 U.S.C. § 441a(a)(4); *DSCC* v. *FEC*, at A23 (Wilkey, J., dissenting).[21]

Under § 441a(a)(4) national senatorial committees may make unlimited transfers to or receive unlimited transfers from national, state or local committees of the

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[19] See 2 U.S.C. § 441a(a)(8), and 11 C.F.R. § 110.6 (1981), which require any contributions to a committee that are earmarked for a particular candidate to be treated as contributions to that candidate for purposes of contribution limitations under § 441a(a). Section 441a(a)(8) prevents the use of party committees as conduits for contributions to a particular candidate and ensures that a candidate will not know the identity of contributors of the fungible funds that a party committee expends on his or her behalf.

[20] Neither DSCC nor the court of appeals suggests that expenditures in accordance with agency agreements circumvent the overall dollar limitations placed on party committee expenditures by § 441a(d)(3). DSCC v. FEC, at A33 (Wilkey, J., dissenting).

[21] Until 1976 all political committees, including non-party committees, could make unlimited fund transfers to each other. The 1976 amendments to FECA for the first time imposed limits on contributions from one political committee to another. 2 U.S.C. §§ 441a(a)(1)(C) & (2)(C). In § 441a(a)(4), however, Congress excepted party committees from these limitations in order to maintain the freedom of party committees to transfer funds.

same party. *See id.* at A32.[22] Delegation of authority under agency agreements between the national and state committees and NRSC is tantamount to a transfer of funds between these committees.[23] To construe § 441a(d)(3) to prohibit agency agreements is inconsistent with § 441a(a)(4)'s express grant of transfer authority to party committees, including senatorial campaign committees.

Agency agreements comport with the purpose of § 441a because funds received by NRSC are limited by § 441a(a) and funds expended by NRSC are within the overall limitations of § 441a(d)(3). *Id.* at A26. Candidates benefit from enhanced party advocacy on their behalf which in turn encourages candidate loyalty to the party and decreases candidate vulnerability to influence from individual pressure groups. *Id.* at A37. Construing § 441a(d)(3) to prohibit agency agreements conflicts with the meaning of § 441a(a)(4), destroys the harmony of the statutory scheme of § 441a and undermines its purpose.

3. The legislative history of 2 U.S.C. § 441a confirms that agency agreements are consistent with congressional intent.

Congress did not intend to prohibit agency agreements between party committees. Section 441a(d) was originally proposed in 1974 as part of S.3044, § 304,[24]

[22] National senatorial committees are national committees for purposes of the transfer provision. S. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 58, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976, at 1052 (1977); DSCC v. FEC, at A32 n.16 (Wilkey, J., dissenting); Respondent's Brief in Opposition, at 7-9.

[23] DSCC v. FEC, at A26 (Wilkey, J., dissenting). Judge Wilkey notes that the difference between agency agreements and fund transfers is "purely one of form, not substance." *Id.*

[24] The Senate version of this provision was adopted by the conference committee, S. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess.

which, when introduced, contemplated total public financing of general election campaigns for federal office. S.3044, §101, 93d Cong., 2d Sess. 71-78, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 73-80 (1977). Even under this proposed system of public financing, Congress intended to preserve "the role of political parties in private financing for federal candidates." S. Rep. No. 93-689, 93d Cong., 2d Sess. 7, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977).[25]

The Senate Report recognized that "pooling resources from many small contributors is a legitimate function and an integral part of party politics." *Id.* Section 441a(d) was intended as "a special provision for private funding by *political parties.*" *Id.* (emphasis added). Its purpose was to permit candidates for federal office to accept full public assistance and benefit from "substantial private funding, in addition to the public grant, in the form of expenditures by state and national party committees." *Id.* Money received by party com-

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56, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 1000 (1977), and ultimately passed by Congress, *id.* at 1122.

[25] In considering the 1974 amendments to FECA, Congress was familiar with the traditional role of state and national committees, including the senatorial and congressional committees, in private financing for federal candidates. *See* 2 U.S.C. § 434(d)(1976) (repealed Pub. L. No. 96-187, § 104, 93 Stat. 1348 (1979)); H. R. Rep. No. 93-1239, 93d Cong., 2d Sess. 157, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 791 (1977) (comments of Representative Frenzel describing role of national party committees, *including* congressional and senatorial campaign committees, and urging adoption of § 441a(d) to "allow parties to play a strong role in the electoral process").

mittees in keeping with the contribution limits would increase party resources "to conduct *party-wide* election efforts." *Id.* at 104 (emphasis added). Section 441a(d) was enacted to protect and enhance the role of parties "in building strong coalitions of voters and in keeping candidates responsible to the electorate through the party organization." *Id.* The conference committee adopted § 441a(d) as passed by the Senate. S. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess. 56, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 1000 (1977).[26]

The legislative history of § 441a(d) establishes that Congress intended to preserve the freedom of political parties to structure party committee spending in support of candidates for federal office. Agency agreements comport with this congressional intent. Such agreements facilitate the "pooling" of resources by coalitions of voters, S. Rep. No. 93-689, 93d Cong., 2d Sess. 7, *reprinted in* Legislative History of Federal Election Campaign Act of 1974, at 103 (1977), in order to enhance the effectiveness of their message in support of party candidates. Agency agreements permit all party committees to benefit from fundraising and media expertise and economies of scale. *See DSCC* v. *FEC,* at A28-A29 (Wilkey, J., dissenting). In turn, effective use of party resources in support of party candidates encourages candidate loyalty and responsiveness to the party.[27]

[26] The public financing provisions for congressional campaigns were deleted in conference. S. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess. 1, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 945 (1977).

[27] Many of the abuses associated with the 1972 presidential election campaign, which prompted the 1974 amendments to FECA, might have been avoided if President Nixon had not largely circumvented party committees in favor of the Committee to Re-Elect the President. *See* S. Rep. No. 93-981, 93d Cong., 2d Sess. 18-20 (1974).

In contrast to this abundant evidence of congressional intent to provide parties with flexibility, there is no evidence of intent to prohibit agency agreements.[28] The legislative history establishes that agency agreements are consistent with congressional intent.[29]

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[28] The court of appeals points to the rejection of an amendment proposed by Senator Brock, which would have exempted congressional and senatorial campaign committees from § 441a(d)'s expenditure limits, as confirmation that Congress did not intend to permit agency agreements. DSCC v. FEC, at A16. However, the overall expenditure limitations are not at issue in this case and there is no contention that such limitations were exceeded. *Id.* at A33 (Wilkey, J., dissenting).

[29] Continued congressional concern with the ability of political parties to structure their own finances is evidenced by consideration and rejection of H.R. 11315 in 1978. H.R. 11315, 96th Cong., 1st Sess. (1979). Section 313 of that bill contained language that would have prohibited any "movements of funds" between "the political committees of a national political party (including house and senate campaign committees of such party) and the political committees of a state political party for the purpose of making contributions to, or expenditures on behalf of, any candidate for federal office." *Id.* The House rejected a rule for consideration of H.R. 11315. 124 Cong. Rec. H2261-69 (daily ed. Mar. 21, 1978).

The basis for the rejection is reflected in various comments attacking the bill. Representative Mikva remarked that he "deeply regretted that the committee in its wisdom saw fit to change the party financing." *Id.* at H2265. Representative Stockman urged defeat of the bill stating that the proposed legislation was a "fundamental assault on the very integrity, the continued viability, the continued meaningful role of our political parties." *Id.* at H2264; *see* note 37 *infra*.

Overt acts of Congress are significant in determining legislative intent. *See, e.g.*, Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 181-85 (1978). The rejection of H.R. 11315 and the debate in connection with that action evidence congressional intent to leave the structuring of funding in relation to federal candidates up to each

B. The Court Of Appeals Decision Restricts Political Expression And Association Protected By The First Amendment Without Furthering Any Substantial Governmental Interest.

Section 441a(d)(3), as construed by the court of appeals, burdens the First Amendment interest in free political expression and association and fails to further any substantial governmental interest. So construed, the statute is unconstitutional. Construing § 441a(d)(3) in accordance with its plain meaning avoids unconstitutional restrictions of First Amendment rights.

1. The court of appeals construction of 2 U.S.C. § 441a(d)(3) restricts constitutionally protected rights of political expression and association.

Section 441a(d)(3) operates in an area at the core of the First Amendment guarantee of free expression. *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976), proceeds from the premise that freedom to discuss public officials and oppose or support their continuation in office constitutes the "central meaning" of the First Amendment, *see New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966), because "speech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). Political expression is afforded maximum constitutional protection because of its "inherent worth in terms of its capacity for informing the public." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978); *accord*,

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political party and its committees. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 412-13 (1972); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 460-61 (1974).

Consolidated Edison Co. v. *Public Service Commission,* 100 S. Ct. 2326 (1980).[19]

In *Buckley,* this Court held that a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." 424 U.S. at 19. By limiting campaign contributions and expenditures, FECA "constitutes a restriction on communication . . . since virtually all meaningful political communications in the modern setting involve the expenditure of money." *Id.* at 11. *Buckley* leaves no doubt that "the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests." *Id.* at 23.

Section 441a(d)(3) also implicates the freedom of political association protected by the First Amendment. *Id.* at 15. "[T]he right of individuals to associate for the advancement of political beliefs," *Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968), is a "basic constitutional freedom," *Kusper* v. *Pontikes,* 414 U.S. 51, 57 (1973); *accord, Democratic Party* v. *LaFollette,* 49 U.S.L.W. 4178, 4182 (U.S. Feb. 24, 1981) (No. 79-1631); *Shelton* v. *Tucker,* 364 U.S. 479, 486 (1960); *Bates* v. *City of Little Rock,* 361 U.S. 516, 522-23 (1960). When individuals join together to form a political association, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced." *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958). Freedom of association, and hence effective political advocacy, is implicated by limitations on the ability of individuals to "pool money through contribu-

[19] In *Buckley,* this Court rejected a claim that 18 U.S.C. § 608(f), the predecessor of 2 U.S.C. § 441a(d), violated the Fifth Amendment. 424 U.S. at 58-59 nn. 66 & 67. No First Amendment challenge to § 608(f) was before the Court in *Buckley.*

tions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley, supra,* 424 U.S. at 65; *accord, Common Cause* v. *Schmitt,* Nos. 80-1609 & 80-1754, slip op. at 14 (D.D.C. Sept. 30, 1980) (three-judge court), *prob. juris. noted,* 48 U.S.L.W. 3616 (U.S. Feb. 23, 1981) (Nos. 80-847 & 80-1067).

The agency agreements at issue in this case facilitate the exercise of these First Amendment rights. The state and national committees of the major political parties enter into these agreements in order to enhance their political expression and association by utilizing the financial resources and national political expertise of NRSC. *DSCC* v. *FEC,* at A28-A29 (Wilkey, J., dissenting). The effectiveness of political expression and association is maximized in a number of ways by designation of NRSC to make § 441a(d)(3) expenditures, including "economy of scale in expenditures from one source, . . . available expertise in creating and placing advertisements, . . . obtaining media exposure, [and] obtaining credit during the campaign." *Id.* NRSC is able to "pool money from individuals who are interested in politics and amplify their shared viewpoint into an efficient political message," *Common Cause, supra,* slip op. at 14.[31]

These functions are especially significant because of the "increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning." *Buckley, supra,* 424 U.S. at 26. Such effective political expression and association are at "the heart" of the First Amendment for "the constitution 'protects expression which is eloquent no less than that which is unconvincing.' " *Bellotti, supra,* 435 U.S. at 790 (quoting *Kingsley International*

[31] *See* S. Rep. No. 93-689, 93d Cong., 2d Sess. 7, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977).

Pictures Corp. v. *Regents*, 360 U.S. 684, 689 (1959)); *NAACP* v. *Button*, 371 U.S. 415, 428-31 (1963).

The First Amendment interest in effective political expression and association as practiced by NRSC is representative of the constitutional protection generally afforded political parties in federal election campaigns.[32] The party "is but the medium through which its individual members seek to make more effective the expression of their own views." *NAACP* v. *Alabama*, *supra*, 357 U.S. at 459. This Court has held that the "right to associate with the political party of one's choice is an integral part of the basic constitutional freedom" to associate. *Kusper*, *supra*, 414 U.S. at 57. A restriction on a political party in its conduct of an election campaign "is simultaneously an interference with the freedom of its adherents." *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975) (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957)); *Democratic Party*, *supra*, 49 U.S.L.W. at 4182.

The court of appeals incorrectly assumed that no First Amendment interests are implicated by reading § 441a(d)(3) to invalidate the agency agreements at issue here. It asserted that the "coordinated expenditures" on behalf of a candidate made by NRSC are merely "contributions" to that candidate, *DSCC* v. *FEC*, at

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[32] The historic role of political parties as the primary institution for aggregating and articulating the views of large groups of voters is well-documented. *See, e.g.*, E. Ladd, Jr., Where Have All the Voters Gone? (1978); J. Kirkpatrick, Dismantling the Parties (1978); Parties, Interest Groups, and Campaign Finance Laws (M. Malbin ed. 1980); The New American Political System (A. King ed. 1978). There is little dispute among political scientists that "for a century and a half, U.S. political parties have been a force for extending democracy." E. Ladd, *supra*, at 59.

A13-A14 n.28; *see* 2 U.S.C. § 441a(a)(7)(B)(i), which are entitled to no constitutional protection, *DSCC* v. *FEC*, at A13 n.26. But, as Judge Wilkey noted in his dissent, "the majority fails to grasp the significance of what the Supreme Court did in *Buckley*" when this Court held that "*both*" contributions and expenditures are protected by the First Amendment. *Id.* at A39 n.27 (Wilkey, J., dissenting) (emphasis in original).

The First Amendment interests involved in this case are much greater than those implicated by the contribution limits upheld in *Buckley*. In *Buckley*, this Court reasoned that a limit on the amount of a political contribution to a candidate is of comparatively *less* constitutional significance than an independent expenditure limitation because a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U.S. at 21. The "quantity of communication . . . does not increase perceptibly with the size of [the] contribution." *Id.*

Here, in contrast, a prohibition of NRSC's agency agreements with state committees will directly decrease the *quantity* and the *quality* of the party's political expression by depriving state committees of the discretion to enter into agency agreements with NRSC which may more effectively advocate their views.[33] Expenditures by NRSC at the behest of state committees constitute political expression by the Republican Party. Such expenditures are therefore distinguishable from contribu-

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[33] *See* Ripon Society, Inc. v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir.) (*en banc*), *cert. denied*, 424 U.S. 933 (1976) ("a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests deserves the protection of the constitution").

tions to candidates, where "the transformation of contributions into political debate involves speech by someone other than the contributor," *id.* at 21.[34]

This Court confronted a similar situation in *Buckley* with respect to expenditures by a candidate on his own behalf. *See id.* at 52 n.58. The court of appeals in *Buckley* had held that such expenditures should be treated as "contributions" by the candidate to himself, subject to FECA's strict limitations on contributions. This Court rejected such an analysis because, "unlike a person's contribution to a candidate, a candidate's expenditure of his personal funds directly facilitates his own political speech." *Id.* Similarly, expenditures by a political party in support of a candidate are more than symbolic manifestations of support for that candidate — they "directly facilitate" party advocacy of its candidates' election campaigns.

2. The court of appeals construction of 2 U.S.C. § 441a(d)(3) does not further a substantial governmental interest.

The court of appeals decision burdens the First Amendment interest in effective political expression and

[34] Party expression is entitled to extensive constitutional protection especially since the FEC has barred party committees, including NRSC, from making "independent expenditures." *See* 11 C.F.R. § 110.7(b)(4) (1981). While other political associations and individuals can "spend as much as [they choose] . . . to collect for political speech, including advocacy of a particular candidate's election," California Medical Ass'n v. FEC, No. 79-4426, slip op. at 9 (9th Cir. May 23, 1980), *review pending*, 49 U.S.L.W. 3207 (U.S. Oct. 7, 1980) (No. 79-1952), all political party expenditures in support of congressional candidates are subject to the limitations contained in § 441a(d)(3). Under the court of appeals construction of § 441a(d)(3), DSCC and NRSC would be prohibited from making *any* expenditures in support of senatorial candidates.

association. The court's construction of § 441a(d)(3) can only be supported if it serves a substantial governmental interest. *Buckley, supra*, 424 U.S. at 47; *Cousins, supra*, 419 U.S. at 489; *NAACP* v. *Alabama, supra*, 357 U.S. at 460. In *Buckley*, this Court held that the only sufficiently compelling governmental interest in this area is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25; *accord, Common Cause, supra*, slip op. at 9. This governmental interest will override First Amendment rights because "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley, supra*, 424 U.S. at 26.

The court of appeals does not and could not claim that its reading of § 441a(d)(3) is necessary to stem incipient political corruption. "[T]here is no visible evil in any 'undue influence' by a political party on its own nominated candidate." *DSCC* v. *FEC*, at A38 (Wilkey, J., dissenting). The more a candidate is beholden to his own political party for a substantial portion of his campaign funds, the less vulnerable he is to pressure groups. *Id.* at A36. Any possibility that a candidate would be unduly influenced by a contributor to his political party is effectively prevented by §§ 441a(a)(1)(B) & (2)(B), which limit the amount of such contributions. As in *Buckley*, "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." 424 U.S. at 55; *accord, Common Cause, supra*, slip op. at 10.

In *Buckley*, this Court employed a similar analysis of the alleged governmental interest supporting limits on a candidate's expenditure of his personal funds. The Court determined that there is no threat of corruption or apparent corruption when a candidate spends his personal funds. *Buckley, supra*, 424 U.S. at 53. "Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse." *Id.* Political party expenditures, which also raise no question of potential corruption, serve an analogous function by fixing the candidate's allegiance firmly to his party, a wholly salutary result.

The court of appeals asserted that its construction of § 441a(d)(3) is necessary to encourage the development of vigorous state party organizations. *DSCC* v. *FEC*, at A18. The court of appeals reasoned that by designating NRSC as its agent a state committee defeats Congress's intention that it play an active role in senatorial campaigns. *Id.* at A19. Nowhere in the legislative history is there any suggestion that Congress intended to create any special role for state committees under § 441a(d)(3)." Even if such an intent could be

" This paucity of relevant legislative history stands in bold contrast to the 1979 amendments to the statute in which Congress clearly expressed an intention to assist local party committees by passing legislation exempting them from limits on expenditures for so-called "grassroots" activities. In passing this provision, unlike § 441a(d), Congress stated that it intended "to encourage volunteers to work for and with local and State political party organizations." H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 9 (1979), *reprinted in* [1979] *U.S. Code Cong. & Ad. News*, 2860, 2868. Assuming that such a congressional intent did exist, however, the agency agreements at issue here are in no way at odds with a desire to foster the role of state committees. Under § 441a(d)(3), a state committee retains the power to spend its allotted funds or to designate an agent, such as NRSC, to act on its behalf. The state committee has sole dis-

discerned, it does not rise to the compelling level necessary to support a restriction on political expression and association such as the court of appeals interpretation of § 441a(d)(3).

In the last analysis, the only interest served by an interpretation of § 441a(d)(3) to prohibit agency agreements is the suppression of political party expression.[16] In adopting this interpretation, the court of appeals has implicitly determined that it is somehow "unfair" for NRSC to engage in effective political fundraising and advocacy when DSCC has been unable, through its own efforts, to render equally effective services to Democratic candidates.[17] Yet the desire to equalize the resources and

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cretion to decide in what manner party funds will be most effectively utilized, and it is in no way compelled to designate an agent if it does not wish to so do.

[16] The record below reveals that DSCC's complaint is directed at the ability of NRSC to campaign effectively on behalf of senatorial candidates. In the district court, DSCC argued that, because of NRSC's agency agreements with state committees, it is more likely "to influence the outcome of elections for the United States Senate." Petitioner's Memorandum in Support of Summary Judgment, at R. 4-20. Although no expenditure ceiling has been violated, DSCC nevertheless complains that "agency agreements have clearly resulted in Republican candidates obtaining the benefits of hundreds of thousands of dollars that would otherwise have not been available." *Id.* at R. 4-4.

[17] The legislative history of H.R. 11315, § 313, *see* note 29 *supra*, is illustrative. The practical effect of this legislation would have been to render the agency agreements at issue here illegal. Both Democrats and Republicans, however, recognized that the provision was intended solely to deprive the Republican Party of its ability to engage in effective fundraising and political advocacy. *See generally*, 124 Cong. Rec. H2261-69 (daily ed. Mar. 21, 1978). According to Representative Davis, the bill "says that our [Democratic] Party has not done its job in fulfilling its obligation to raise money. So what do we do? We come in and we try to place limitations on

thereby the expression of political parties is forbidden by the First Amendment. *Buckley* plainly states that the constitutional guarantee of free political expression "denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." 424 U.S. at 57. As construed by the court of appeals, § 441a(d)(3) restricts the ability of political parties to make expenditures on behalf of its nominated candidates and is inconsistent with *Buckley's* teaching that there "is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate." *Id.* at 56.

3. A proper construction of 2 U.S.C. § 441a(d)(3) avoids unconstitutional restrictions of the freedoms of expression and association.

The court of appeals construction of § 441a(d)(3), which is inconsistent with the interpretation of the district court and the unanimous FEC, is at odds with both the plain meaning of the statute and the First Amendment requirements articulated in *Buckley*. Its practical effect is to deny one political party freedom to engage in legitimate campaign advocacy on behalf of its candidates for public office. When a statute is susceptible of two interpretations, it must be read in the manner most consistent with the exercise of constitutional rights. *See Califano* v. *Yamaski*, 442 U.S. 682, 693 (1979). In a case such as this, where First Amendment rights are at stake, a reviewing court must interpret the statute at

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it. . . . The problem is that our party did not do the job, so we changed the rules in the middle of the ball game." *Id.* at H2266. The Democratic majority offered to withdraw the provision because, according to Majority Leader Wright, "we ought not craft a bill deliberately in a way that would predetermine the outcome of an election as between one party and the other." *Id.* at H2268.

issue to permit the maximum amount of unrestrained political expression possible in light of the substantial legislative purpose, if any. *See DSCC* v. *FEC*, at A39 (Wilkey, J., dissenting); *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (*en banc*) (*per curiam*). The court of appeals disregarded these maxims of statutory construction and incorporated into § 441a(d)(3) a novel prohibition of political expression and association not evident in its plain language. This Court should reinstate the statutory interpretation that reflects both the plain meaning of § 441a(d)(3) and the dictates of the First Amendment.[11]

C. The Court Of Appeals *De Novo* Review Of The FEC's Decision To Dismiss DSCC's Complaint Conflicts With The Standard Of Limited Judicial Review Provided In FECA and Fails To Defer To The FEC's Longstanding Interpretation Of Its Governing Statute.

FECA provides that the FEC has exclusive jurisdiction[12] over enforcement of the statute. 2 U.S.C.

[11] The court of appeals decision that § 441a(d)(3) prohibits agency agreements places NRSC in the position of violating § 441a, which may constitute a criminal offense punishable by fine and imprisonment. 2 U.S.C. § 437g(d)(1)(A). "Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests." Buckley, *supra*, 424 U.S. at 40-41 (citations omitted). To avoid unconstitutional vagueness, § 441a(d)(3) must contain language that "affords the '[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'" *Id.* at 41 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). Under the court of appeals construction, § 441a(d)(3) is unconstitutionally vague since it does not, on its face, provide a precise prohibition of agency agreements.

[12] Congress gave the FEC "exclusive primary jurisdiction with respect to the civil enforcement of Federal election laws." H.R.

§ 437c(b)(1). This express congressional grant of exclusive jurisdiction entitles FEC decisions "to great respect by the courts because of the extremely delicate nature of the tremendous power entrusted to it." *In re Carter-Mondale Reelection Committee, Inc.*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132, at 51,038 (D.C. Cir. Sept. 12, 1980). Judicial restraint is required since the FEC is "vested with a wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections." *Id.; see DSCC* v. *FEC*, at A20-A21 n.2 (Wilkey, J., dissenting).

As a result, judicial review of the FEC's dismissal or failure to act with regard to a complaint "is limited." *Hampton* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036, at 50,439-40 (D.D.C. Apr. 15, 1977), *aff'd mem.*, No. 77-1546 (D.C. Cir. July 21, 1978); *accord, In re Carter-Mondale Reelection Committee, Inc., supra*, ¶ 9132, at 51,038. A court may not substitute its judgment for that of the FEC and may set aside FEC action only if it acted in a manner "which was arbitrary or capricious, was an abuse of discretion or was otherwise contrary to law." *Hampton, supra*, ¶ 9036, at 50,444; *see* 2 U.S.C. § 437g(a)(8)(C); *DSCC* v. *FEC*, at A20 (Wilkey, J., dissenting).[40] The FEC's

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Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 35, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976, at 1029 (1977). Any complaint "bottomed on an alleged violation" of the campaign financing laws is within the "exclusive competence" of the FEC and "all other tribunals must therefore 'yield to the primary jurisdiction' " of the agency. H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 4, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976, at 804 (1977).

[40] The court of appeals declined to engage in a limited review of the FEC's decision to dismiss DSCC's complaint on the basis that

decision to dismiss DSCC's complaint has a reasonable basis in law. The court of appeals *de novo* review abrogates the congressional grant of exclusive jurisdiction and undermines the FEC's "discretionary power 'to determine' whether or not a civil violation has occurred." *Buckley, supra*, 424 U.S. at 112 n.153.

In addition to failing to engage in a limited review, the court of appeals erred by refusing to defer to the FEC's interpretation of its governing statute and to recognize that its First General Counsel's Report provided a basis for the FEC's decision. It is by now a "commonplace" rule that " 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' " *Environmental Protection Agency* v. *National Crushed Stone Association*, 49 U.S.L.W. 4008, 4013 (U.S. Dec. 2, 1980) (No. 79-770) (quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1966)). When Congress delegates "broad administrative lawmaking power," the statute is best construed by the agency which gives it substance. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 559 (1980). In a recent case involving construction of the federal election laws, the District of Columbia Circuit affirmed the importance of deferring to the FEC's past practices, especially when, as here, "its interpretation is supported

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this case does not involve a discretionary exercise of FEC power, but an interpretation of a federal statute. DSCC v. FEC, at A8. However, the rule requiring limited review of FEC action extends to interpretation of the federal election laws. *See, e.g., In re* Carter-Mondale Reelection Comm., Inc., *supra*, ¶ 9132, at 51,037; Hampton, *supra*, ¶ 9036, at 50,439-40; Gelman v. FEC, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132, at 51,020 (D.C. Cir. July 18, 1980), *cert. denied*, 49 U.S.L.W. 3227 (U.S. Oct. 6, 1980) (No. 80-209).

by the language and overall purpose of the statute being construed." *Gelman, supra*, ¶ 9130, at 51,020-21; *accord, DSCC* v. *FEC*, at A20 n.1 (Wilkey, J., dissenting). The FEC decision upholding the agency agreements is "in accord with the precedent established over the lifetime of the practice of delegation by both the national and state committees." *Id.* at A29.[41] The FEC's finding of "no reason to believe" that NRSC violated FECA in making expenditures under § 441a(d)(3) as agent of Republican state committees is entitled to deference by reviewing courts and should be upheld.

CONCLUSION

For the foregoing reasons, Petitioner National Republican Senatorial Committee respectfully prays that the judgment below be reversed.

Respectfully submitted,

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[41] *See* Advisory Opinion 1976-108, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5236 (Feb. 15, 1977); *In re* National Republican Senatorial Comm., FEC Matter Under Review 780 (agency agreements between NRSC and RNC and NRSC and Montana Republican State Committee did not violate § 441a(d)(3)); *In re* National Republican Senatorial Comm., FEC Matter Under Review 820 (agency agreements between NRSC and RNC and NRSC and Alabama Republican Party did not violate § 441a(d)(3)).